Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
StogMedia	)	
	)	MB Docket 17-314
Vs:	)	
	)	CSR-8947-L
Cox Communications Las Vegas, Inc.	)	
	)	
Petition for Cable Special Relief	)	
	)	
To: The Chief, Mass Media Bureau	)	

RESPONSE TO OPPOSITION AND MOTION TO DISMISS

Charles Stogner, dba StogMedia ("petitioner" hereafter referred to as StogMedia), herein submits its response to the opposition and motion to dismiss filed by Cox Communications Las Vegas, Inc. dba Cox, through its attorneys ("Cox") in reply to the Petition for Cable Special Relief filed by StogMedia due to Cox's refusal to provide leased access airtime and the termination of discussion regarding the matter, for alledged failure to meet Cox's own insurance requirements . In it's response Cox has claimed in its summary the following:

"The Petition raises a number of other unsupported and frivolous claims alleging Cox interfered with the content of leased access programming, prohibited resale of leased access capacity, demanded excessive credit and security, and acted in bad faith. Even a cursory review of the facts and documentation, however, demonstrates that these claims are patently false.

The Petition, moreover, is unsupported by any affidavit or documentation in violation of the Commission's threshold requirements, and references no Commission rule, order, or adjudicatory decision to support the Petition's claims. The Petition consequently fails the "clear and convincing" standard required under the statute and the Commission's rules. In these

circumstances, the Commission's rules and precedents preclude assigning any evidentiary weight to StogMedia' s Petition. The Bureau, therefore, should summarily deny and dismiss the Petition.

In reply, StogMedia reaffirms its request for Special Relief be granted and that the Commission direct Cox to provide the leased access carriage as requested or convincely demonstrate the reasonableness and need of its insurance requirements.

Cox has stated StogMedia must provide a Certificate of Insurance consistent with the terms and conditions of the Agreement prior to execution (see Section 6). StogMedia may provide such Certificate of Insurance in conjunction with its signed Agreement, but until Cox receives it, Cox will not execute the Agreement and carriage of StogMedia's Programming will not begin.

Per Section 6 of the Leased Access Agreement as provided by Cox:

6. INSURANCE AND SURETY BONDS.

(a) INSURANCE. LESSEE shall obtain and have in effect at all times during the Term, Errors and Omissions insurance, written by insurance carriers holding a Best's rating of A- or higher with limits of $1,000,000 per occurrence covering liability arising from all shows provided to the LESSOR. LESSEE shall obtain individual certificates for each state within which any System listed in Exhibit B(s) is located in whole or in part. The policy shall provide for thirty (30) days' prior written notice to LESSOR of any material change, non-renewal or cancellation of coverage. Prior to execution of this Agreement and each time that a change is made in the Policy, the carrier, or Exhibit B resulting in the addition of a System necessitating an additional State certificate, LESSEE shall deliver to LESSOR a Certificate(s) of Insurance evidencing such coverage and naming eachLESSOR listed on any Schedule B as an additional insured under the policy as evidence of coverage obtained per this section and shall not limit or restrict any indemnification obligation of the LESSEE under this Agreement.

The agreement also furthers goes on to contain an indemnity clause.

"INDEMNITY. LESSEE shall at all times indemnify and hold harmless LESSOR, its parents, subsidiaries and affiliates, and the officers, directors and employees of each from and against all claims, suits, complaints and liability, including without limitation damages, costs and attorneys'

fees incurred by LESSOR in connection with: (a) the cablecast of the Programming; (b) any use of the Channel; (c) any of the operations of LESSEE; "

To that end StogMedia provided a copy of its policy from its carrier AXIS showing the required coverage (errors and ommissions-media, publishers, broadcasters or "media perils" insurance). StogMedia has provided a copy of this policy to the Commission in it's initial filing.

After further correspondence over certain provisions of the policy and in which StogMedia readily cooperated in attempting to meet the requirements of Cox (see attached **insurance e-mail chain** and **AXIS policy endorsements**), Cox concluded (and what is at issue) that it requires that "since StogMedia is not the producer of the programming that is proposed to be aired on it's leased access channel, it must have the actual producer (in this case "Jon Basso") named as an additional insured. (See e-mail corre-spondence dated August 4th and 9th. On August 30th StogMedia objected saying

"You have no idea what problems you are causing with us having to name our affiliate as 'additional insured' due to the application required for this. Question is....if Jon Basso sells or simply grants me rights to the show is it not then my sole responsibility, my liability, the same as if this was any show StogMedia has rights to air? While we've tried our best to satisfy Cox in this, trying to meet the demands placed on our editorial content in order to get our programming on the air, we've never really brought up the issue of cable operators being prohibited from exercising any editorial control over programming carried on leased access channels.

Does not Cox insistence on the 'additional insurance' on a show an example of 'exercising editorial control.'

As I've tried to explain, StogMedia is going to do whatever it takes to be able to exercise the right to leased access airtime so if you can't agree our having the rights to any show means it is thereby covered by our insurance, please share with me how this is done by the other programmers, leased and non-leased' on Cox channels?

You are mindful of FCC's position that the burden of establishing that the required insurance is reasonable is upon the cable operator; whether or not the operator requires non-leased programmers (long-form for example); whether or not Cox has incurred litigation costs in this type case or the liability the programming will pose a liability risk.

I've avoided making an issue over these two matters, hoping Cox would go ahead and provide us carriage".

In this case, it would appear that Cox is trying to institute a program specific (third party) insurance requirement. None of this is mentioned in Section 6 of the Leased Access agrement. Since StogMedia could have many programs airing on the leased access channel, all produced by different people or companies, would it then require that each and every program be named as a additional insured on the policy. If so, this would be a logistical nightmare.

Finally, StogMedia in its e-mail dated Sept. 14th stated:

This means we've reached a point in this where now the burden of proof that supports your demand this show be made 'additional insured' lies with you.
Should you continue to deny us carriage based on your insistence on the coverage without providing proof as FCC says, then at some point this must be taken up with FCC. If this must come to be, let's hope it doesn't hold us off a few more months. It has already delayed us over two months.

I shouldn't have to point out that the law and FCC rules have you 'held harmless' from our programming with the exception of permitting you to require coverage to protect from some claim of obscenity in our material. Here's where you can view the show on youTube. https://www.youtube.com/watch?v=qe8eR0RxBOc&t=30s

The bottom line here and the basis of our petition is that, Cox has **repeatedly** and **blatantly** ignored StogMedia's request for proof that it's insurance requirements

are reasonable. As StogMedia has repeatedly pointed out to Cox (**see e-mail chain**) that while the Commission has determined that cable companies may establish reasonable insurance requirements in order to protect itself, the Commission has also determined that the burden of proof lies upon the cable company to establish the reasonableness of such.

See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Leased Commercial Access, Second Report and Order and Second Order on Reconsideration of the First Report and Order, CS Docket No. 96-60, FCC 97-27, 12 FCC Rcd 5267 (1997) ("Second Report and Order") (the Commission concluded that insurance requirements must be reasonable in relation to the objective of the requirement. Cable operators will bear the burden of proof in establishing reasonableness and insurance requirements may be sufficient to insure adequate coverage. Determinations of what is a "reasonable" insurance requirement will be based on the operator's practices with respect to insurance requirements imposed on non-leased access programmers, the likelihood that the nature of the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors).

The prior was copied directly from the footnote in proceeding DA-07-273, CSR 6336-L, Roderick Harsh, United Productions vs MediaCom in which the Commission wrote " However, in United Media Concepts, the Commission concluded that the cost to United of obtaining insurance required by the cable operator was an obstacle to obtaining access. Similarly, in the instant case, United contends that the requirement to obtain $1 million worth of insurance is extremely cost prohibitive and will prevent the company from obtaining leased access if insurance at that amount is required. The burden of establishing that the required insurance is reasonable is upon Mediacom. No evidence has been filed by Mediacom establishing the reasonableness of its insurance requirement, such as whether Mediacom requires non-leased access programmers to obtain insurance or carries insurance with respect to non-leased access programming, whether Mediacom has incurred litigation costs in this context, or the likelihood that the programming at issue will pose a liability risk. Consequently, we find that Mediacom's insurance requirement as applied to United is not in compliance with the leased access rules and should be eliminated or reduced to a reasonable amount consistent with the Second Report and Order.

The Commission has reaffirmed the burden of proof is upon the cable companies in several other cases. Cox has failed to provide any evidence to support its requirement, even when such was pointed out in the Petition. Cox has failed to provide any of the following. What is the operator's policy with respect to insurance requirements imposed upon non-leased access programmers. What is the likelihood that the nature of the leased access programming will pose a liability risk for the operator, previous instances of litigation arising from the leased access programming, and any other relevant factors? Cox's failure to provide any supporting information, should alone be basis to grant the relief sought by StogMedia.

StogMedia asks;

Is program specific insurance coverage imposed upon all the programming provided on the Cox cable system, including local TV stations, national network programming, cable specific programming and advertising spot insertions in which the material was produced by third parties? How many of these are required to be named as additional insured? How many cases has Cox had to defend itself for lawsuits brought against it or named as a defendant, arising from leased access programming carried on its cable systems? Please provide the nature of such and the costs associated. Has Cox won or lost these cases? How many complaints or threats of suits has Cox received involving leased access programming carried on its systems? What was the outcome?

Is Cox trying to be funny or are they exhibiting contempt for FCC, the Congress that created leased access and StogMedia as they state in the opening sentence of their Summary in their petition of "Opposition and Motion to Dismiss" CSR-8947-L, the plain language of the Commission's rules, policies, and precedents preclude the Petition's unsupported claims." What 'unsupported' claim? Cox continues by first addressing the issue of insurance by saying, "the crux of the Petition is that Cox should be compelled to carry such programming without insurance of any kind." This is such a blatant misrepresentation of fact it should be labeled a 'lie'. StogMedia offered evidence of not only providing the FCC supported "Media Perils" coverage but also had the carrier name Cox and 'additional insured' Then StogMedia went further by providing Cox a copy of the policy, nowhere saying Cox was expected to provide us carriage without us ‘providing insurance of any kind’.

The fact in this matter is Cox also demanded that StogMedia have their local affiliate also named as 'additional insured'. StogMedia uses the term 'affiliate' for those local programmers airing shows on cable sites where StogMedia has a valid 'leased access agreement' in effect, meeting the requirements of the law, FCC rules and having the local cable site named as 'additional insured' on their Media Perils policy. We believe this as an unreasonable requirement that goes above and beyond what is necessary for valid insurance coverage. This would produce an additional burden on StogMedia regarding costs, paperwork and delays and can be further

projected as determental to the average leased access operator, who may wish air programming produced by third parties.

Cox violated leased access rules by demanding information on programming that went beyond that described in the rules governing leased access. Cox was adamant that we name this affiliate 'additional insured' since he was the producer of the show we were seeking to air. Our insurance carrier informed us our affiliate as part of StogMedia was already covered under our policy. This was a StogMedia show whether actually produced by the affiliate or me or any other person working for StogMedia. StogMedia had rights to air the show on cable and was therefore responsible for contents.

As to Cox's questions on programming, demands going beyond that concerning 'editorial content' as prescribed at 47 U.S. Code § 532 where FCC says, (a cable operator) may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

However, how does Cox explain their demands regarding the editorial content are not in conflict with 47 U.S. Code § 532 - Cable channels for commercial use where it states: A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

Is not Cox trying to exercise control over editorial content when in their 'application' for leased access Question 10, they require the applicant to: List and provide all copyrights, permits, licenses, and clearances necessary for the proposed service and identify those already obtained.
Does not the basic law prohibit cable operators from "in any other way consider the content of such programming, except as noted above. Are not cable operators 'held harmless' from a

leased access programmer's content except perhaps that material that may be considered 'lewd or obscene' per Section 638 of the Communications Act of 1934?

Does not StogMedia's reply to Cox question B1 re the 'nature of the programming', where we state our content will be FCC category 3: "All other Programming", no 1. Programming for which a per-event or per channel charge is made. or 2. Programming more than fifty percent of the capacity of which is used to sell products directly to consumers; and does that not satisfy the question when 47 U.S.C. § 612 (b) (5) Video programming is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 602).

With respect to our contention that Cox appears to be in violation of Section 76.971(h) of the Commissions Leased Access Rules. In its defense Cox stated that this should be rejected, because StogMedia misunderstands the meaning of both the Rule and Section 3 of the Agreement. Cox provided the following:

Section 76.971(h) of the Rules provides in pertinent part:

Cable operators may not prohibit the resale of leased access capacity to persons unaffiliated with the operator, but may provide in their leased access contracts that any sublessees will be subject to the non-price terms and conditions that apply to the initial lessee[.]

Again we present what is in the contract:

3. CHANNEL USE. LESSEE shall use the Channel solely in strict accordance with the provisions of this agreement for the distribution of the Programming.

(a) CONTROL OVER PROGRAMMING AND CHANNEL. LESSEE must remain in full control over the Programming and the Channel and may not sublease or delegate control, directly or indirectly, in whole or in part, over the Channel during the Leased Time to any third party.

Per their attorneys. *"The foregoing demonstrates that although the Agreement requires the lessee to maintain control over the programming and the leased channel capacity to ensure that sublessees remain subject to the terms and conditions of the Agreement, it in no way prohibits the resale of leased access channel capacity."*

We ask then, what exactly does it say? In plain English, the average person would conclude that the lessee may not sublease or resale leased access capacity. There is nothing in the language of

the Agreement **"that subleasees remain subject to, etc.** We will leave it to the Commission to interpret what it says and if it is compatible with its rules.

In Conclusion:

StogMedia is a Mississippi-based video production company that distributes video programming via leased access capacity purchased from multiple cable systems nationwide and one of the largest users of leased access channels by itself and through its affiliates. Charles Stogner is a founder and serves as President of the Leased Access Programmers Association, a trade organization dedicated to promoting the opportunity and navigating the maze for the use of Commercial Leased Access on cable systems as established by Congress and codified in Section 612 of the Communications Act. Stogner has more than 36 years as a leased access user and has become one of the leading experts on leased access rules and requirements. StogMedia has obtained carriage on a number of cable systems throughout the years and has provided the same policy to them which it has supplied to Cox and that such policy has been satisficatory and accepted by the other companies to meet their insurance requirements.

Where the issue of insurance became the crucial crux of Cox refusing StogMedia carriage was when after naming Cox as 'additional insured' on the policy, our carrier declined to also acquiesce to naming our Las Vegas affiliate as 'additional insured', explaining that the show (apparently all shows airing as StogMedia content) were covered under our policy. Indeed it would appear that the insurance company did provide an endorsement naming Jon Basso as an additional insured, but may have been overlooked. (See **AXIS policy endorsements** attachment).

Cox never acknowledged StogMedia's pointing out FCC has said, "The burden of proof in establishing reasonableness was placed on cable operators." Cox simply continued to demand our carrier make our affiliate, the local StogMedia site manager, 'additional insured' since in an attempt to speed up Cox granting us airtime under leased access, he had written Cox saying he produced the show. Affiliates, managers. on-staff video editors, producers, etc., all part of StogMedia's operation at any site, produce all manner of content from 30 second commercials

for advertisers to covering 'live events' and more. In fact, in its response Cox appears to shift the burden of proof onto StogMedia *"Unlike most of the leased access cases involving insurance issues to have come before the Bureau over the years, StogMedia's Petition raises no issue regarding the reasonableness of Cox' s insurance requirements"*

We feel a simple review of the correspondence will reveal Cox is trying to mislead FCC using smoke and mirrors in their "Opposition and Motion to Dismiss" and ask that FCC not only require Cox to provide StogMedia an agreement that complies with leased access law, rules and any and all orders FCC may have issued regarding formal leased access agreements and provide other relief which has been requested in its petition.

StogMedia suggests since Cox has so blatantly exhibited contempt for FCC, the Congress that created leased access and StogMedia as they went to extraordinary steps to avoid permitting us to exercise the right to leased access as provided by law, that FCC impose a serious forfeiture on Cox for such willful action.

I, Charles H. Stogner, Senior Partner, StogMedia by signature below and under penalty of perjury do hereby attest that I have reviewed the foregoing reponse to the opposition and motion to dismiss as filed by Cox and the information contained within is true and accurate to the best of my knowledge and belief.

Respectfully Submitted,

Charles H. Stogner
StogMedia

Dated: 12/26/2017

CERTIFICATE OF SERVICE

I, Charles H. Stogner, under penalty of perjury, do hereby attest that I have sent or caused to have sent a copy of this "Response to Opposition and Motion to Dismiss and the insurance e-mail string attachment and insurance notes attachment by electronic means ("email") to the following person (s) and e-mail address (s) on this 26th day of December , 2017.

Philpott, Joiava (CCI-Atlanta-LD) Joiava.Philpott@cox.com

Hightower, Jennifer (CCI-Atlanta-LD) Jennifer.Hightower@cox.com

I have also caused to be sent a hard copy of the petition and attachments by First Class U.S. Mail, postage prepaid, sent certified with return receipt requested on the 26th day of December. 2017 to the following:

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